

DOJ/FTC Request for Information on Merger Enforcement

Comments:

As Emergency Medicine (EM) Physicians, we submit the following comments.

There has been a lack of enforcement regarding the entry of private equity into contract ownership for the provision of EM physicians to hospitals resulting in labor exploitation, patient exploitation, and a growing public health threat. Other medical specialties are similarly affected. Factors that are inadequately addressed by the existing guidelines relate to the “rollup” nature of the industry. Consolidation in EM has primarily occurred through small-scale mergers/acquisitions that tend to fly “under the radar,” but the reality is that four large private equity-backed or affiliated companies (Envision, TeamHealth, Schumacher, US Acute Care Solutions) now control approximately half of the nation’s emergency department (ED) contracts. (1) Scrutiny of this ongoing consolidation is sorely needed.

The entry of private equity also leads to higher prices for consumers in a market that is inelastic and anti-competitive by nature, accompanied by lower quality services. Because private equity firms pay for existing contracts at prices as high as 10-12 times EBITDA, a driving force behind these mergers and acquisitions is invariably the intent to drive up prices. Indeed, the very presence of private equity in the ownership of medical practices necessarily creates the risk of higher prices given the need for private equity owners to produce a significant ROI for their investors. The actions of private equity players regarding “surprise billing” is one well-documented example of a consequence to the public. (2,3)

Emergency medicine is a particularly unique medical market in that patients have little choice in which ED they visit. It is therefore important to protect patients from potentially abusive financial practices by carefully vetting those who hold the contracts for EM services.

Private equity control also causes depressed wages and worse labor conditions for physicians and non-physician providers who deliver care in EDs. Emergency physicians are reporting suppressed wages and decreased staffing even while serving on the front lines during the COVID-19 pandemic and despite CARES act bailouts. (4) Indeed, a recent Doximity survey indicates that EM had the worst compensation trend of any medical specialty from 2017 to 2021. (5) This coincides with the rapid growth of private equity control of our specialty.

Private equity-owned entities have also entered into joint ventures with hospital systems, such as the HCA-Envision deal, where physician fees are shared with hospitals, providing incentive for hospitals to award the contract to those private equity-owned entities. (6) Additionally, private equity-owned staffing companies have acquired other physician specialties in order to obtain leverage in obtaining ED contracts by offering hospitals the ability to decrease subsidies paid to other specialties (e.g., hospitalists). TeamHealth, for example, acquired a large hospitalist company for \$1.6 B in 2015. (7)

There are also unfair restraints of trade and other conditions of employment that interfere with the ability of the labor force to mitigate the effects of being owned by private equity players. Physician contracts containing restrictive covenants and non-interference agreements prevent the EM physician from competing for the existing contract when it is up for renewal. Other unconscionable contractual terms allow for termination without cause, inhibiting physicians’ ability to speak out against business practices that are detrimental to patients. Finally, there is a widespread inability of EM physicians to see

what is actually being billed or paid in connection with their own care delivered to patients. The physician, therefore, cannot serve as a check on fraudulent or inappropriate billing of the consumer. (8,9)

Numerous sources have revealed a deceptive scheme used by private equity-owned entities to circumvent state laws prohibiting corporations from owning physician practices. The use of a front professional association that is directly controlled by the private equity-owned entity overrides the consumer protections that are supposedly guaranteed by state prohibitions on the corporate practice of medicine. (10,11)

In summary, the current guidelines are insufficient to address the “rollup” consolidation of ED practices by private equity and its consequences for patients and the labor force. A greater focus on the role of private equity in medicine is overdue. Given the unfair competition and deceptive practices, a 6(b) study by the FTC may also be warranted. The entry, and now growing dominance, of private equity, which seeks a large ROI from patient care services, is neither in the best interests of the consumers nor the EM labor force. Thank you for this opportunity to comment.

Sincerely,

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